United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

Affidavit

75-6079

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-6079, 75-6093

B

P/S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and THE CITY OF NEW YORK,
Plaintiffs-Appellees,

—v.—

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' ASSOCIATION, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE EEOC's PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT:	
THE USE OF A TEMPORARY RATIO FAVORING THE ENTRY OF NON-WHITES INTO THE APPRENTICE PROGRAM IS AN APPROPRIATE REMEDY UNDER TITLE VII, EVEN ASSUMING A VALID TEST.	3
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	Page
Alevy v. Downstate Medical Center, ___ N.Y. 2d ___ (April 8, 1976)	1
Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973)	1, 3, 11
Carter v. Gallagher, 452 F.2d 315 (8th Cir.) (en banc), cert. denied, 406 U.S. 950 (1972)	5
Chance v. Board of Examiners, ___ F.2d ___ (Dkt. Nos. 75-7161-7164, January 19, 1976) pet. for reh. filed, February 2, 1976	1
Franks v. Bowman Transportation System, 44 U.S.L.W. 4356 (March 26, 1976)	7
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	3
Kirkland v. New York State Dep't of Correctional Services, 520 F.2d 420 (2d Cir. 1975) pet. for reh. denied, ___ F.2d ___ (Dec. 10, 1975)	1, 3, 10, 11, 14
Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc) cert. denied, 419 U.S. 895 (1974)	4, 5, 6, 12
Patterson v. Newspaper & Mail Deliverers' Union of New York and Vicinity, 514 F.2d 767 (2d Cir. 1974) pet. for cert. filed, 75-155, 44 U.S.L.W. 3069 (July 28, 1975).	1, 3, 7
Rios v. Enterprise Association, etc., 501 F.2d 622 (2d Cir. 1974)	1, 3, 7-8

TABLE OF AUTHORITIES
(continued)

Cases:	Page
United States v. Bridge and Iron Workers, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971)	8
United States v. International Brotherhood of Electrical Workers, Local 212, 472 F.2d 643 (6th Cir. 1973)	8
United States v. Wood, Wire & Metal Lathers Int'l Union, 471 F.2d 408 (2d Cir.) cert. denied, 412 U.S. 939 (1973)	1, 3, 8
Vulcan Society v. Civil Service Commission, 490 F.2d 387 (2d Cir. 1973)	1, 3, 12,
Statutes:	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e	passim
Section 703(j), Title VII, 42 U.S.C. § 2000e-2(j)	3, 7-10
Section 703(h), Title VII, 42 U.S.C. § 2000e-2(h)	3, 7
Other:	
Slate, Preferential Relief in Employment Discrimination Cases, 5 Loyola U.L.J. (Chicago) 315 (1974)	3
Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972 (Committee Point, 1972)	8

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. Nos. 75-6079, 75-6093

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs-Appellees,

v.

LOCAL 638. . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

APPELLEE EEOC'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

This appeal involves an important issue--the use of temporary admission preferences or "quotas" in court decrees designed to remedy unlawful employment practices--an issue on which "the court seems badly divided." Feinberg, J., concurring, slip opinion at 2504. Because of the importance of the issue and because the panel opinion conflicts with previous opinions of this Court* and of other courts of appeals, en banc consideration is warranted.

STATEMENT

This suit was brought against Local 28, Sheet Metal Workers, challenging the discriminatory exclusion of blacks and persons with Spanish surnames from union membership, in violation of Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1970, Supp. II.). The panel** evaluated the evidence of the three week trial and found that Local 28 "exercises complete control over entry into the sheet metal trade in New York City." Slip opinion at 2483. In exercising that control, the panel found, Local

* The issue has been discussed by panels of this Court in United States v. Wood Wire, & Metal Lathers, Local 46, 471 F.2d 408, cert. denied, 412 U.S. 939 (1973); Bridgeport Guardians, Inc. v. Civil Service Commission, 482 F.2d 1333 (1973); Vulcan Society v. Civil Service Commission, 490 F.2d 387 (1973); Rios v. Enterprise Ass'n, etc. 501 F.2d 622 (1974) (split decision); Patterson v. Newspaper and Mail Deliverers Union, 514 F.2d 767 (1974), petition for cert. filed, No. 75-155, July 28, 1975; Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (1975), pet. for reh. denied, ___ F.2d ___, (Nos. 445, 499, Dec. 10, 1975); Chance v. Board of Examiners, ___ F.2d ___ (Docket Nos. 75-7161-75-7164, Jan. 19, 1976) (split decision), pet. for reh. filed Feb. 2, 1976.
Compare, Alevy v. Downstate Medical Center, ___ N.Y.2d ___ (April 8, 1976).

** Senior Circuit Judge Smith, Circuit Judge Feinberg, and District Judge Ward (S.D.N.Y.).

28 "consistently and egregiously violated Title VII." Id. at 2487. The panel further found that Local 28 had acted in "bad faith" in not complying with previous court orders directing the elimination of discrimination, and concluded that Local 28's behavior "would be even worse had it not been for the rather minor concessions it has grudingly made under court order." Id. at 2488-90.

Despite Local 28's "egregious" conduct, the panel in a split opinion, limited relief.* While agreeing with Judge Smith that the District Court properly imposed a goal of 29% for non-white membership in the union including its apprentice program by 1981, the panel majority voided a 3:2 non-white ratio established by the court-appointed Administrator and ordered by the District Court and prohibited the District Court from establishing any temporary ratio for entry into the apprenticeship program, once Local 28 validates and administers job-related tests.** According to the majority, a validated test makes "ability to perform the sole criterion for selection," Id. at 2499, so that the use of the ratio "to the lists of those successful in such an exam is forbidden reverse discrimination." Id. at 2501. The majority

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* Judge Smith wrote the panel opinion but stated he "disagreed with majority of the panel on this point."

** The ratio was established pursuant to an Affirmative Action Program (supplemental record, 55) ordered into effect by the District Court on November 13, 1975. This Program is presently the subject of an appeal filed by Local 28 (Dkt. No. 76-6003).

relied for this conclusion on its reading of Kirkland v. New York State Department of Corrections, 520 F.2d 420 (2d. Cir. 1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971), and § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). In addition, Judge Feinberg, in a concurring opinion, intimates that § 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), may be an absolute bar to the use of race or sex-based ratios to cure unlawful discrimination under all circumstances.

ARGUMENT

THE USE OF A TEMPORARY RATIO FAVORING THE ENTRY OF NON-WHITES INTO THE APPRENTICE PROGRAM IS AN APPROPRIATE REMEDY UNDER TITLE VII, EVEN ASSUMING A VALID TEST.

The holding by the panel majority in this case is the first appellate holding denying a District Court the power to fix temporary ratios for entry level positions to remedy past unlawful (and here, also, egregious, blatant, bad faith) discrimination. It conflicts not only with holdings of other panels of this Court,* but those of other courts of appeals.**

While the panel majority recognized the legitimacy

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* Patterson v. Newspaper & Mail Deliverers' Union of New York and Vicinity, supra; Rios v. Enterprise Ass'n, etc., supra; Vulcan Society v. Civil Service Comm'n, supra; Bridgeport Guardians, Inc. v. Civil Service Comm'n, supra; United States v. Wood, Wire & Metal Lathers, Local 46, supra.

** Judge Mansfield's dissenting opinion in the denial of rehearing en banc in Kirkland, supra, 11 FEP Cases at 1255-56, cites representative decisions in each court of appeals to have considered the issue. Other cases are collected in Slate, Preferential Relief in Employment Discrimination Cases, 5 Loyala U.L.J. (Chicago) 315,318-20, nn.8-10 (1974)

of the District Court's requirement that Local 28 attain a non-white membership of 29% by 1981, it denied the court (and Local 28) the most reliable--and perhaps, in a recessionary economy the only--means for achieving that goal: the use of race-based ratios for the entry of qualified applicants into the apprentice program. The record in this case demonstrates the strong need for such relief, especially since the apprentice program has historically provided almost 80% of the entrants into Local 28. (401 F.Supp at 471).* Progress in meeting interim goals and the ultimate goal of 29% non-white membership in Local 28 has already been severely hampered so that as of January 15, 1976, six months after the District Court's decision, Local 28's population (including apprentices) remains at less than 5% non-white. See, Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc) cert. denied. 419 U.S. 895 (1974) (quotas approved because in remedying discrimination, the court's remedy "must be one that works and works now").

In severely circumscribing the power of the District Court the panel majority erred on at least five grounds:

1. The majority holds that the highest test scorers must be given preference, regardless of how few non-whites

* Pursuant to the District Court's decision Local 28 administered a journeyman examination in October, 1975; 36 persons passed of whom only 17 were non-white (supplemental record, 60 at 97). The Affirmative Action Program (supplemental record, 55) directed the entry of 100 apprentices in February, 1976. As the panel opinion noted that number was reduced to 66 persons of whom 33 were non-white, primarily because of unemployment in the industry.

are included in that category, and regardless of the number of non-whites whose scores are high enough to predict success in the apprentice program.

The majority's approach is manifestly unfair. While attempting to provide a remedy for past discrimination the majority requires that non-white applicants, who are only now obtaining a real opportunity to be selected as apprentices, must be judged by new and more stringent standards than have historically been applied to whites. In the past there was no cut-off score on the tests used for selection of apprentices (401 F.Supp. at 475). Indeed the defendants have reached as far down the test score lists as necessary to select apprentices to fulfill their needs.* Thus, future non-white applicants should be permitted to be selected not in comparison with a particular group of white applicants but in comparison with the flexible standards historically available to whites. To do otherwise would disregard the essential purpose of the remedy, to overcome the past discrimination. Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972) (en banc). The use of a race based ratio which selects non-whites who

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* The size of apprentice classes has varied greatly from year to year. (1073a). Furthermore in 1970 the defendants began to choose two classes from the rankings on one test. The members of the later class were selected from the group ranking lower than the class selected earlier (170a-174a). In 1969 because of a need for manpower all who took thetest were admitted. 401 F.Supp at 479.

meet the standards for predicted success as apprentices on the test and who are within the range of acceptability under Local 28's traditional selection procedures is, far from constituting "reverse discrimination", only fair and just.*

2. The concept of "identifiable reverse discrimination" has little application to the facts of this case. Under the terms of the District Court's Order and Judgment (¶21(c), 137a-39a) and the Affirmative Action Program (¶22. supplemental record, 55) the defendants are required to administer an apprentice aptitude test and indenture apprentices on a yearly basis. But for that directive, no one would presently be gaining admission to the program because, at Local 28's insistence, the Joint Apprenticeship Committee has refused to indenture new apprentice classes since October 1972. (See Stipulation of Facts ¶51,

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* The imposition of higher qualifications as a condition for providing relief for non-whites also reinforces the continuing deterrent effect of Local 28's previous blatently discriminatory practices. Only when a substantial number of non-whites are actually enrolled in the apprenticeship program is it likely that non-whites will believe that the discriminatory barriers to entry into Local 28 have fallen:

> We are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks.

Morrow v. Crisler, supra, 491 F.2d at 1056.

1073a). Thus, it is only because of the District Court's exercise of its remedial power under Title VII that whites presently have any opportunity to gain admission to the apprentice program. To that extent, the District Court's action provides a special benefit to whites as well. See, Patterson v. Newspaper & Mail Deliverers etc., supra, 514 F.2d at 773. Thus, the admission ratio here "cannot be characterized as illegal or unfair." Id. at 775.

3. Section 703(j) does not deprive the District Court of power to impose entry ratios to cure prior discrimination. First, § 703(j) is found in that part of Title VII which defines unlawful discrimination. Cf. Franks v. Bowman Transportation System, 44 U.S.L.W. 4356 4360 (March 26, 1976).* This court has expressly held that § 703(j) does not limit the power of a District Court to order appropriate relief, including entry ratios, once there has been a clear violation of the law. In Rios v.

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* In Franks, the Supreme Court held that a related provision, § 703(h), 42 U.S.C. 2000e-2(h)

> is directed toward defining what is and what is not an illegal discriminatory practice. There is no indication in the legislative materials that [this section] was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved.

44 U.S.L.W. at 4360. Cf. Chance v. Board of Education, supra (Oakes, dissenting).

Steamfitters, Local 638, supra, 501 F.2d at 631, this Court held that § 703(j)

> was intended to bar preferential quota hiring as a means of changing a racial imbalance attributable to causes other than unlawful discriminatory conduct. It does not prohibit the use of goals "to eradicate the effects of past discriminatory practices."

Cf. United States v. Lathers, Local 46, supra, 471 F.2d at 413. Other courts agree.*

Second, the Rios holding finds ample support in the legislative history of the 1972 amendments to Title VII, legislative history which neither the concurring opinion here nor any panel of the Court has yet discussed. In 1972 Senator Ervin proposed two amendments to prohibit the type of relief which the concurring opinion considers § 703(j) precludes.** Both were defeated by two-thirds majorities. The Democratic and Republican floor managers both explained that they opposed the amendments because they would prevent District Courts from providing adequate remedies for pervasive discriminatory practices. Senator Javits expressly mentioned certain preliminary relief ordered by the District Court in Rios.

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* E.g., United States v. International Brotherhood of Electrical Workers, Local 212, 472 F.2d 634 (6th Cir. 1973); United States v. Bridge and Ironworkers, 443 F.2d 544 (9th Cir.), cert. denied., 404 U.S. 984 (1971).

** The text of the amendments, nos. 829 and 907, appear in Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act (Committee Print, 1972) at 1017 and 1681 respectively.

I would also like to cite in that regard [i.e., § 703(j)] the opinion in the United States v. Ironworkers Local No. 86, 443 F. 2d 544, decided in the Ninth Circuit Court of Appeals as recently as May of 1971, in which the court held, in a Title VII "pattern or practice" case, that there was an affirmative duty for minority recruitment where it was shown that there was past discrimination which now required correction, and that the court could order that correction affirmatively without violating section 703(j) relating to preferential treatment of individuals or any group, and so forth, where had been illegality. The Court would not allow a respondent to profit from his own illegality under cover of Section 703(j).

Now, Mr. President, I am told, and I believe the information to be reliable, that under the decision made last week by Judge Bonsal in New York, in the Steamfitters case [337 F.Supp. 217 (SDNY 1972)] an affirmative order was actually entered requiring a union local to take in a given number of minority-group apprentices.

What this amendment seeks to do is to undo the Philadelphia plan and those court decisions.

* * *

The amendment, in addition to dismantling the Executive order program, would deprive the courts of the opportunity to order affirmative action under Title VII of the type which they have sustained in order to correct a history of unjust and illegal discrimination in employment and thereby further dismantle (sic) the effort to correct these injustices.

118 Cong. Rec. 1665 (1972). Senator Williams agreed:

I am afraid--I am desperately afraid--that this amendment would strip Title VII of the Civil Rights Act of 1964 of all its basic fiber. It can be read to deprive even the courts of any power to remedy clearly proven cases of discrimination.

Id. at 1676. The holding of the panel majority, we submit, accomplishes what Congress expressly rejected.*

4. Kirkland v. New York Department of Correctional Services does not support the panel majority. In Kirkland, this Court held that the use of a racial quota for the purpose of promotion from the entry position of correctional officer to the next higher position, sergeant, where there was a "paucity of proof concerning past discrimination," was impermissible. Kirkland, supra, 520 F.2d at 428. The proof in the present case comes closer to being a surfeit than a paucity: Local 28's unlawful behavior was consistent, egregious, blatant, in bad faith; "indeed," the full panel notes, Local 28's brief on appeal "does not even make a serious effort to contest the finding of Title VII violations." Slip opinion at 2490. Moreover, the preference here will operate only at the level of entry into the apprenticeship program and will not interfere with a statutorily-mandated civil service promotion system. In Kirkland, by contrast, the affected white correctional officers had "vested" positions on a

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* The Section-by-Section Analysis of the Equal Employment Opportunity Act of 1972 states:

> "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 Cong. Rec. 7166

See prior case law referred to in footnotes at pp.3,8 supra.

civil service promotion list, considerations which the Court deemed crucial in reaching its decision. Kirkland, supra, 520 F.2d at 428-29. See also, Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n., supra, 482 F.2d at 1341 (entry-level preference approved; promotion ratios disapproved).

5. A validated test will not necessarily distinguish qualified applicants by merit. The majority implicitly assumes that ratings on a validated test will have a one-to-one correspondence with ability as a sheet metal worker. There are two reasons why this is unlikely. First, no test has yet been devised which gives such a perfect fit. While a validated aptitude test may show a significant correlation between high scores and success as a sheet metal apprentice, it may, and probably will, not predict significant differences between the success as a sheet metal worker of two applicants with relatively high but different scores. Thus a validated test will not be able to predict with any certainty that an applicant with a score of 85 has less chance to graduate from the apprentice program than an applicant with a score of 95. Hence, using race as a factor in making selections from among qualified applicants to cure the past discrimination cannot constitute "reverse" discrimination since there is no reliable method

of determining which of the qualified candidates has more "merit." Moreover, a score on the mechanical comprehension test to which the ratio would apply is only part of the selection standards for apprentices. The Affirmative Action Program (¶21-32, supplemental record, 55) requires an applicant to meet age and education requirements and show a proficiency in math and a "read and follow directions" test. "[T]he imposition of some affirmative hiring relief need not inexorably lead to dilution of valid employment qualifications" Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir. 1974) (en banc). The preference in this case would not dilute proven standards of qualification.

Second, the majority assumes the validated test will accurately predict performance as a sheet metal worker. That overstates test reliability. The examination will predict trainability in the apprenticeship program. While there undoubtedly will be some significant correlation between test result and success as a sheet metal worker, the true correlation is only between test score and successful completion of the apprenticeship training course. Cf. Vulcan v. Civil Service Commission, supra, 490 F.2d at 396, n 11. The panel majority's assumption therefore that the test will definitively determine the "merit" of someone as a sheet metal worker is highly problematic. No test has yet been validated.

Thus, the kind of factual record which would be necessary to measure the real impact of such a test in terms of impermissible "reverse discrimination" does not exist. The majority's assumption therefore has no present factual basis.

In sum, the majority's ruling in this case on the issue of an admission preference in favor of non-whites finds support in neither prior precedent nor the terms of Title VII. The District Court's conclusion that a remedial goal was "essential to place the defendant in a position of compliance with the 1964 Civil Rights Act", 401 F.Supp. at 488, should not have been disturbed. See, Vulcan Society v. Civil Service Commission, supra, 490 F.2d at 399.

CONCLUSION

For the reasons stated above and because the various panels of this Court are so "badly divided" on this question, rehearing en banc is appropriate. Rule 35 F.R.A.P; Kirkland v. Department of Correctional Services, pet. for reh. denied, supra (Kaufman, C.J.

Respectfully submitted,

April, 1976

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

12th day of April, 1976 she served a copy of the within Appellee EEOC's Petition for Rehearing and Suggestion for Rehearing En Banc

by placing the same in a properly postpaid franked envelope addressed:

1) W. Bernard Richland, Corporation Counsel, NY City Municipal Bldg., NY, NY ATTN: Ellen Sawyer
2) Louis Lefkowitz, Atty. Gen. 2 World Trade Center, NY, NY 10007 ATTN: Dominick Tuminaro
3) Rosenthal & Goldhaber, 44 Court Street, Brooklyn, NY ATTN: William Rothberg
4) Sol Bogen, Esquire, 1 Penn Plaza, NY, NY 10001
5) David Raff, Esquire, 49-51 Chambers Street, NY, NY 10007

And deponent further says she sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

12th day of April, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977